

No. PD-1072-19

IN THE COURT OF CRIMINAL APPEALS OF TEXAS FILED
COURT OF CRIMINAL APPEALS
3/19/2020
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ON REVIEW FROM THE COURT OF APPEALS FOR
THE SIXTH DISTRICT OF TEXAS AT TEXARKANA
No. 09-16-00045-CR

DANIEL THOMAS BARNES,

V.

THE STATE OF TEXAS,

ARISING FROM: **CAUSE NO. 48,046-A**
IN 188TH DISTRICT COURT OF,
GREGG COUNTY, TEXAS

APPELLANT'S BRIEF ON DISCRETIONARY REVIEW

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ORAL ARGUMENT NOT REQUESTED

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

Pursuant to Tex. R. App. P. 68.4(a) (2014), the Judge, parties, and counsel in this suit are:

TRIAL JUDGE: The Honorable J. Scott Novy
 188th Judicial District Court

APPELLANT: Daniel Thomas Barnes

APPELLEE: The State of Texas

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now Jeff T. Jackson, attorney for DANIEL THOMAS BARNES, Appellant in the above styled and numbered causes, and respectfully submits this Brief, and would show the Court the following:

STATEMENT OF THE CASE

Appellant was charged by felony indictment with Burglary of a Habitation and proceeded to a bench trial. RR4 pp. 13-14. The court found Appellant guilty and the prior felony used for enhancement to be true and sentenced him to 40 years confinement. RR4 pp. 172; 214-216.

The Sixth Court of Appeals of Texarkana found that the State failed to sufficiently link Appellant to some of the alleged prior convictions (the Tennessee judgments) admitted during punishment and remanded the cause for a new punishment hearing.

NOTE:

The record is referred to as:

"CR": clerk's record in Cause No. 48,046-A

"RR": reporter's record in Cause No. 48,046-A

"SX": State's exhibit

ISSUE PRESENTED

This Court granted review of the following issue:

Did the Court of Appeals depart so far from the accepted and usual course of judicial proceedings in finding harm from the admission of State's Exhibits 22 and 23 as to call for an exercise of the Court of Criminal Appeals' power of supervision?

STATEMENT OF THE FACTS

The indictment alleged that Appellant, on or about the 8th day of August, 2018, with intent to commit theft, entered a habitation without the effective consent of the owner thereof. RR4 pp. 13-14. Appellant entered a plea of "Not guilty," and a bench trial commenced. Id. After hearing evidence from the State and arguments by Appellant, the court found Appellant "Guilty" of the charged offense, RR4 p. 172, and the prior conviction

used to enhance the range of punishment to be "True." RR4 p. 214. Appellant was sentenced to confinement in the institutional division of the Texas Department of Criminal Justice for a period of forty (40) years. RR4 pp. 215-216.

During the punishment phase of trial, the State offered prior judgments. SX 20-24. Appellant objected that the State failed to prove the prior judgments were those of Appellant. RR4 pp. 187-210. The court overruled Appellant's objection and (as the Sixth Court of Appeals noted in Cause No. 06-19-00045-CR) took those sentences into consideration when sentencing Appellant. RR4 p. 215. The Court of Appeals found in Cause No. 06-19-00045-CR that Appellant was not sufficiently linked to "the Tennessee convictions" (SX 22-23) because those judgments contained only Appellant's name and signature, and the State did not present additional evidence linking the judgments to Appellant.

SUMMARY OF THE ARGUMENT

The Sixth Court of Appeals was correct in finding harm from the admission of State's exhibits 22 and 23 because the trial court addressed the out-of-state convictions/judgments when pronouncing sentence.

ARGUMENT

THE COURT OF APPEALS DID NOT ERR IN FINDING HARM AND REMANDING THE CAUSE TO THE TRIAL COURT FOR A NEW SENTENCING TRIAL DUE TO ERROR IN ADMITTING THE OUT-OF-STATE CONVICTIONS.

The State's sole argument on review is that the Court of Appeals erred in finding harm sufficient for reversal in the trial court's admission of SX 22-23 (the Tennessee judgments) because there is no indication that those exhibits had any impact on the trial court's verdict on sentencing.

The Court of Appeals correctly applied the harm analysis set out under Rule 44.2(b) of the Texas Rules of Appellate Procedure and discussed in *Graves v. State*, 452 S.W.3d 907, 914 (Tex. App. 2014), by determining whether the error affected Appellant's "substantial rights." *Id.* "An error affects a substantial right of the defendant when the error has a substantial and injurious effect or influence on the jury's verdict." *Id.* The court in *Graves* found that error in the admission of prior judgments at sentencing (as in this case), which is not constitutional error, may be disregarded if (after looking at the whole record) there is 'fair assurance that the error did not influence the [fact-finder], or had but a slight effect.'" *Id.*; see *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002); *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

The Sixth Court of Appeals points to the trial court's statement(s) when assessing punishment, specifically that the trial judge considered, and

rejected, the idea of designing a punishment based around rehabilitation in light of (at least in part) the Tennessee judgments because "other states have given you chances[. . .]" See Opinion in Cause No. 06-19-00045-CR, p. 12. Due to the trial court's statements at sentencing, it cannot be ascertained that the inadmissible judgments did not influence the court's determination, nor can it be presumed that the additional judgments had but a slight effect on Appellant's sentence.

Appellee argues that the other, properly admitted punishment evidence is so overwhelmingly "egregious" and "very serious" that this court should overrule the Sixth Court of Appeals by finding that the Tennessee judgments had, at most, only a slight effect on the punishment assessed. It is true that in a situation such as this, a harm analysis should consider the full record, the nature of that evidence which supports the verdict, the alleged error's character, and how the "error" fits with

the other evidence. *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000). Viewing the Tennessee judgments in the context of the entirety of Appellee's punishment evidence, Appellee spent nearly all of its closing argument discussing Appellant's criminal history. RR4 pp. 207-213. Certainly, the nature and facts of the burglary on trial were discussed, but more time was spent arguing that Appellant had numerous previous convictions, including the Tennessee convictions. The State's arguments, along with the court's comments at the pronouncement of sentencing, create a situation where it cannot be said that there is fair assurance that the error did not influence the court, or had but a slight effect. To the contrary, Appellant was sentenced to double what the maximum sentence would have been (20 years) had it not been enhanced based on his priors. Appellant argues that the Sixth Court of Appeals correctly applied the harm analysis set out under Rule

44.2(b) by finding Appellant's substantial rights were affected by the court's error.

PRAYER

Wherefore, premises considered, the undersigned counsel requests the Court of Criminal Appeals review the record and affirm the ruling of the Court of Appeals, and for such other and further relief to which Appellant is justly entitled.

Respectfully submitted,

/s/Jeff T. Jackson

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CERTIFICATE OF COMPLIANCE

The foregoing Appellant's Brief is in compliance with TEX. R. APP. P. 9.4(i)(2)(B). The total number of words contained in Appellant's Brief that are not specifically excluded from the word count under TEX. R. APP. P. 9.4(i)(1) is 1,075.

/s/Jeff T. Jackson

Jeff T. Jackson

SBOT No. 24069976

Attorney for Appellant,

DANIEL THOMAS BARNES

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that a true and correct copy of the above Motion was served on the State of Texas in accordance with the Rules of Civil and Appellate Procedure on the 17th day of March, 2020.

I further certify that I have mailed a copy of the above Brief by First Class Mail, postage paid, to Appellant.

/s/Jeff T. Jackson

Jeff T. Jackson,

Attorney for Appellant

Automated Certificate of eService

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